IN THE

Supreme Court of the United States

Term, 1940.

No. 350.

ALBERT [illegible] LIEBERMAN, EMIL COHN, JR., and GEORGE F. McCANN, Ancillary Receivers of CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a Corporation,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, and Supporting Brief.

DAVID GOFF,
GEORGE V. STRONG,
HIRSCHWALD, GOFF & RUBIN,
STRONG, SAYLOR & FERGUSON,
Counsel for Petitioners.

1700 Girard Trust Co. Building,
Philadelphia, Penna.

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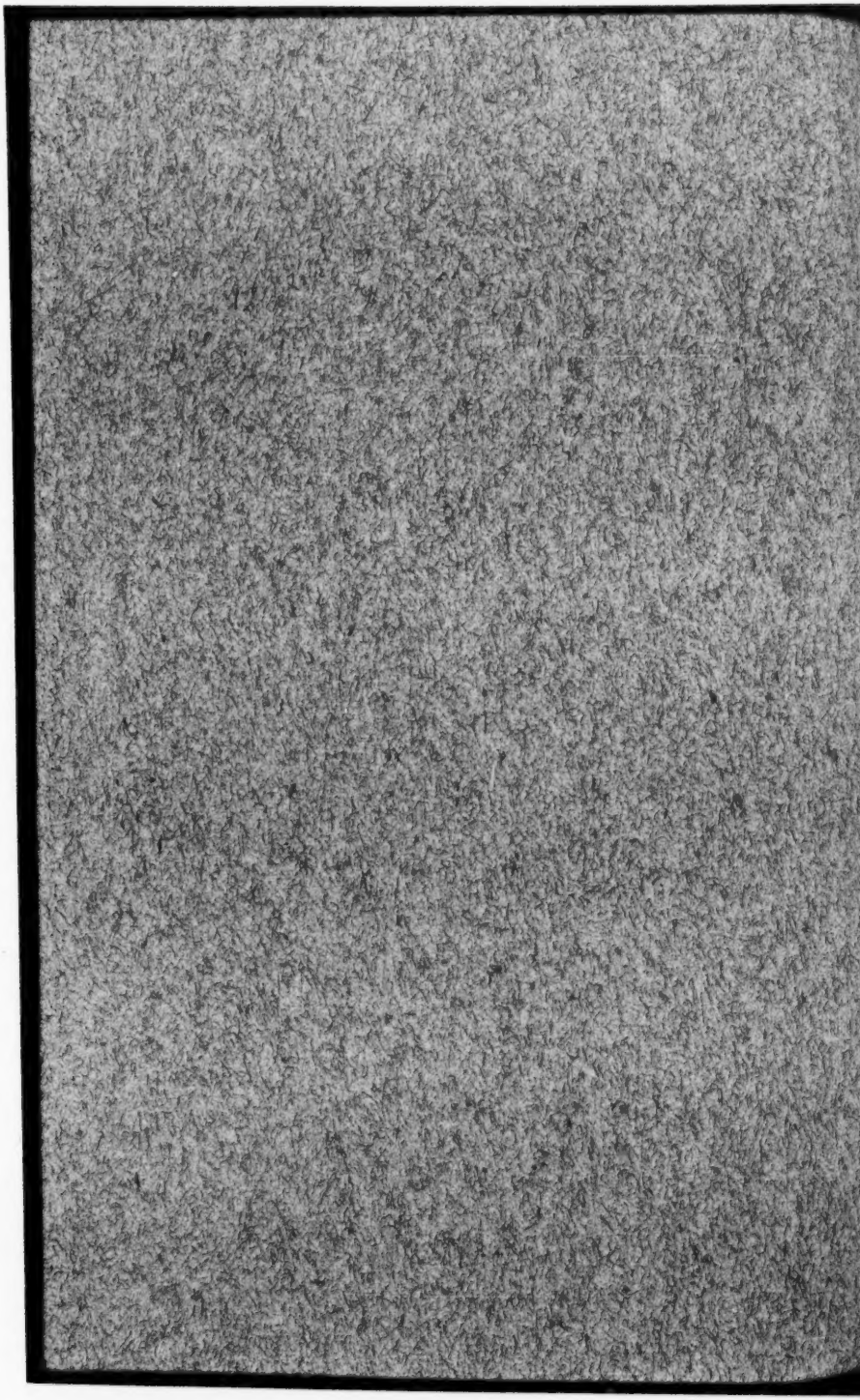

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Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners above named pray that a writ of certiorari issue to review the judgment (R. pp. 244 and 282), of the Circuit Court of Appeals for the Third Circuit entered in the above entitled matter on May 22, 1940 reversing the judgment (R. pp. 233, 237) of the District Court for the Eastern District of Pennsylvania dated May 15, 1938 directing Broad Street Trust Company to turn over to Petitioners certain City of Philadelphia bonds in the face amount of $100,000.

OPINIONS BELOW.

There was no opinion of the District Court accompanying its decree dated May 15, 1938. The opinions of the Circuit Court dated February 8, 1940 and May 22, 1940 are printed in the Record respectively p. 237 and p. 279. They are also reported in 112 F. (2d) p. 424.

JURISDICTION.

The final decision of the Circuit Court of Appeals for the Third Circuit was rendered May 22, 1940.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 938. This section, as limited by the Act of February 13, 1925, Chap. 229, Sec. 8, provides for review by certiorari within three months after the entry of a final judgment of a circuit court.

SPECIFICATIONS OF ERROR UNDER RULE NO. 38.

A conflict exists between the decision of the Circuit Court for the Third Circuit and a decision of this Court and one by another circuit court. The Circuit Court has also probably come to an untenable conclusion on an important proposition of general law.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the respective rights of the parties in City of Philadelphia bonds in the face amount of $100,000 deposited with Broad Street Trust Company of Philadelphia under a certain agreement executed November 30, 1929 [1] by and between Consolidated Indemnity and Insurance Company, a corporation engaged in the business of

[1] R. pp. 11-15.

insurance and indemnity (hereinafter for brevity referred to as "Consolidated") and Broad Street Trust Company.

The deposit was made pursuant to an ordinance of the City of Philadelphia (hereinafter for brevity sometimes referred to as "the City") dated July 4, 1887,[2] under which, in order to qualify on contracts with the City of Philadelphia, foreign insurance or indemnity companies are required to deposit securities approved by the City Solicitor in the face amount of $100,000. The terms of this agreement giving rise to the present dispute are those providing

(a) that the bonds could be sold and their avails devoted only to the payment of any **unsatisfied judgment** in favor of the City of Philadelphia against any contractor with the City whose obligations were assured by Consolidated; and

(b) that the bonds were not to be returned to Consolidated while there were any "outstanding obligations" of Consolidated to the City.

On May 24, 1934, upon the termination of certain proceedings instituted by the Superintendent of Insurance of the State of New York in the matter of the application of

> THE PEOPLE OF THE STATE OF NEW YORK BY GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, FOR AN ORDER TO TAKE POSSESSION AND LIQUIDATE THE BUSINESS AND AFFAIRS OF CONSOLIDATED INDEMNITY AND INSURANCE COMPANY

Part I of the Supreme Court of the State of New York, entered a judgment, inter alia, granting the application of the Superintendent of Insurance described in the caption of the case, also dissolving the corporation and revoking its

[2] R. pp. 9-11.

charter. This is referred to briefly and in summary form in Paragraph 1 of the Report of the Special Master (R. p. 196).[3] The entire decree is submitted as an Appendix hereto, p. 21.

There is no contention by any party to the record that the judgment mentioned in the preceding paragraph has ever been appealed from, or that it is not a final judgment of a court of competent jurisdiction at the place of the domicile of the defendant corporation. Paragraph 1 of the Report of the Special Master just above mentioned was not the subject of any exception by Respondent.

On May 11, 1934, during the pendency of the proceedings in the Supreme Court of New York above described, the District Court for the Eastern District of Pennsylvania entered a decree appointing Petitioners ancillary receivers of Consolidated in and for the Eastern District of Pennsylvania, in which decree all persons whatsoever were ordered to surrender to Petitioners as such receivers all property of any kind belonging or owing to Consolidated, and were further enjoined from "prosecuting, executing or suing out of any court any process, attachment, replevin or other writ for the purpose of taking possession, impounding or interfering with the assets or effects of" Consolidated. The facts just recited in this paragraph were summarized by the Special Master in Paragraph 2 of his Report, (R. p. 196).[4] The entire decree is submitted as an Appendix hereto, p. 26.

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[3] A copy of this decree was offered in evidence, (being Exhibit No. 4, in the hearing before the Special Master on November 26, 1937 (R. p. 59)), but was not included by Respondent in the printed record submitted herewith.

[4] A copy of this decree was offered in evidence at the meeting before the Special Master on November 26, 1937 (R. p. 59), but was not printed by Respondent in the Record submitted herewith.

With leave of the District Court, Petitioners instituted proceedings in equity before that tribunal against Respondent and Broad Street Trust Company (which last defendant by answer has thrown itself on the mercy of the Court). The Bill recited the foregoing facts, prayed an accounting, and the surrender to Petitioners by the defendants in the action of all securities in the hands of Broad Street Trust Co., in excess of proper claims against them. Respondent's answer alleged the existence of "outstanding obligations" of Consolidated to the City but not of any unsatisfied judgments in Respondent's favor against Consolidated.

Two essential questions were presented for disposition in the proceedings:

(a) Is it possible for Respondent to obtain a judgment against Consolidated?

(b) Are there any outstanding obligations of Consolidated to Respondent?

If the answer to the first question is negative, there could be no question but that the securities would have to be delivered to the custody of the court's officers for disposition by it under the terms of the agreement. The second question would appear to be subordinate.

The matter was referred by the Court to Howard Benton Lewis, Esquire, Special Master. Before him the following additional facts were elicited in evidence:

At the time of its collapse Consolidated was surety upon the contracts of several contractors building for Respondent various public works, including subways, streets and public buildings. Each such contract contained an indemnity clause by which *the contractor* agreed to indemnify Respondent against claims by third parties. A stand-

ard instance of such clause appears in the Golder Contract:[5]

> "It is understood and agreed that the party of the second part shall be considered an independent contractor in respect of the work covered by this agreement and that the party of the second part shall alone be answerable for any loss or damage caused by the party of the second part or by the servants, agents or employees of the party of the second part; and the party of the second part agrees to fully indemnify, protect and save harmless the party of the first part from all loss, damage or expense from claims and liability resulting from accident, negligence or other cause during the prosecution of the work covered by this contract. The party of the second part further contracts and agrees to be responsible for and pay all loss or damage to either person or property which may, in any manner, arise by reason of the prosecution of the work covered by this contract during the progress of the same, and, in the case of the happening of such loss or damage, the amount thereof may be retained by the party of the first part out of any payments due or to grow due to the party of the second part under this or any other contract."

The ordinary Statute of Limitations for suits for personal injuries in Pennsylvania is two years, for injuries to property, six years. There is a special act, that of July 1, 1937,[6] providing that in the case of municipalities, unless a court for reasonable "excuse" shown shall decree a waiver of the terms of the statute, no suit shall be brought against a municipality unless written notice be given within six months of the date of origin of such claim or within the same period of the date of the negligence complained of.

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[5] R. pp. 73-74.

[6] P. L. 2547, 53 Purdon's Statutes 2774, a copy of which is appended at the foot hereof in the Appendix, p. 29.

There is no dispute that more than six years have now expired since the completion of all contracts but three wherein Consolidated was surety, the latest of which was completed April 15, 1937.[7] Respondent has received no notice, written or otherwise, nor has it any knowledge of any claim arising out of these three contracts.[8] It is unwilling to surrender the security deposited with the Broad Street Trust Company under the November 29, 1930 agreement until six years have elapsed since the completion of the last contract, or until April 15, 1943, maintaining that until that date there is an "outstanding obligation" by Consolidated. No other types of obligation are involved.[9]

The Special Master filed a report in which he found that there had never been nor were there any unsatisfied judgments against Consolidated in Respondent's favor,

[7] R. p. 165.

[8] R. pp. 111, 113, 121, 138, 170.

[9] (A) In the Special Master's Report reference is made (R. p. 199) to two suits then pending arising out of contracts upon which Consolidated was surety. The record does not disclose the fact but there is no dispute that one of these two suits was discontinued October 21, 1938 and the other non-prossed by Respondent itself January 29, 1940.

(B) Mention was made in one of Respondent's exceptions to the Special Master's Report (R. p. 224) to a contract involving an alleged 15 year guarantee of a station house roof. Reference to the contract (R. pp. 117-120) shows that this provided a guarantee by the manufacturer of the roofing material. As the contract was paid for, the manufacturer's guarantee was evidently furnished.

(C) At the time of the filing of the Master's report, $1839.11 *was* owed Respondent under contracts involving highway maintenance guarantees (R. p. 199). Under order of court, this $1839.11 plus an additional $230.49 has been paid by Petitioners to Respondent.

and that there were no outstanding obligations of Consolidated to Respondent. He concluded that as no judgment by Respondent against Consolidated could hereafter be obtained, the securities ought to be delivered by Broad Street Trust Company to Petitioners as the Court's officers for such disposition as the District Court might direct.[10]

Exceptions by Respondent to the report of the Special Master were dismissed by the District Court in decree signed by Welsh, J. dated May 15, 1938.[11] No opinion was filed, but from the language of the decree it would appear that the Court intended to make no disposition of the secondary question—whether there were any outstanding obligations. The defendants in the action were directed to surrender to Petitioners $100,000 worth of bonds, such securities 'hereafter to be held by Petitioners in their capacity as Receivers separately, Petitioners not to sell the same nor to use the same in any manner whatever except in respect to the collection of coupons for interest thereon and therefrom without further order of the Court.'

Respondent appealed to the United States Circuit Court for the Third Circuit. On February 8, 1940 that Court (Maris, Clark and Jones, JJ, sitting) handed down a decree reversing the decree of the District Court and remanding the cause to the District Court with instructions to dismiss the Bill.[12]

The Circuit Court concluded the first question by deciding that a judgment against Consolidated was not legally impossible. On the second question it decided that there were outstanding obligations of Consolidated to Respond-

[10] R. pp. 196-201.
[11] R. pp. 233-234.
[12] R. p. 244.

ent and this because the indemnity provisions in the contracts such as that quoted on p. 6 hereof, made the contractors liable to Respondent *perpetually;* the contractors' duty to indemnify might arise at *any* time in the future when someone might claim to be injured as a result of "accident, negligence or other cause during the prosecution of the work".

A petition for reargument was granted and at the same time a petition was filed by George deB. Keim and Thomas C. Egan, Ancillary Receivers of International Re-Insurance Corporation by their attorneys, J. Hector McNeal, Franklin E. Barr and J. Wesley McWilliams, for leave to appear and argue as amici curiæ. Such leave was granted. On May 22, 1940, after argument by both the original parties and the amici curiæ, the Circuit Court, with the same judges sitting, affirmed with some modification its former decree. It reaffirmed the conclusions above recited, but held that in view of the "usage" of the City—of which there was no evidence whatever in the Record other than the contentions of Respondent—the securities should not be held for more than six years after the completion of the last contract.[13]

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. Under the terms of the agreement under which the bonds were deposited, they may never be used except to defray unsatisfied judgments in favor of Respondent against Consolidated.[14]

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[13] R. p. 279. Because the contract as to which International Re-Insurance Corporation was surety had at that time been completed more than six years, the amici curiæ have no further interest in these proceedings.

[14] R. p. 14.

2. If such a judgment is legally impossible, the pledged property should be surrendered by Broad Street Trust Company to Petitioners, subject to the agreement, for the action of the District Court in the premises.[15]

3. In holding that a personal judgment is now possible in favor of Respondent against Consolidated, the Circuit Court has departed from a proposition of general law well established by this Court in **Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**, that when a foreign corporation has been dissolved, no suit can be brought against it and no personal judgment against it can be obtained in the absence of a statute or a public policy to the contrary in the state where the foreign corporation has been licensed to do business.[16]

4. In holding that a personal judgment may still be obtained outside its domicile against a dissolved New York insurance company, the Circuit Court has acted in diametric opposition to the decision of the Fifth Circuit Court in **National Surety Co. of N. Y. v. Cobb, 66 F. (2d) 323, (CCA 5, 1933)**, wherein it was directly ruled to the contrary —that a judgment can **not** be obtained in another state against a New York insurance company, previously dissolved in New York, because by the law of New York [17] such an insurance company when dissolved is *civiliter mortuus*, and no action can be maintained against it anywhere.

5. That there is no public policy applicable in Pennsylvania contrary to the propositions mentioned in paragraphs numbered 3 and 4 is abundantly manifest in **Burns v.**

[15] See cases cited in accompanying brief, p. 13 hereof.

[16] See also United States v. Federal Surety Co., 72 F. (2d) 961, (CCA 4, 1934). U. S. Truck Co. v. Penna. Surety Co., 259 Mich. 422, 243 N. W. 311 (1931).

[17] 27 McKinney's Consolidated Laws, Sec. 404.

Niagara Life Insurance Company, 279 Pa. 453, 124 A. 128 (1924).

6. The Circuit Court has given a clause which is customary and in general use in building contracts the character of a contract for perpetual maintenance and insurance **after completion.** No authorities can be found in the law of building contracts directly supporting this view, so that the Circuit Court has decided an important question of general law in a way probably untenable.[18]

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your Petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DAVID GOFF,
GEORGE V. STRONG,
HIRSCHWALD, GOFF & RUBIN,
STRONG, SAYLOR & FERGUSON,
Counsel for Petitioners.

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[18] See argument pp. 16-19 hereof.